BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims is not yet officially reported (R. 22-24).

Jurisdiction.

The judgment of the Court of Claims was entered June 3, 1940. A motion for a new trial was overruled on October 7, 1940 (R. 24, 25). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented, Specification of Errors to be Urged, and Statement of the Case.

A statement of the questions presented, specification of errors to be urged, and a statement of the case will be found in the foregoing petition.

ARGUMENT.

I.

While the court below found that numerous major changes from the contract and specifications were made in the construction of the buildings, it refused to find that other very numerous changes were made, or the effect upon the progress of the work or the delays caused thereby, or the loss resultant therefrom, although all of these requested findings were based on undisputed evidence, and the facts found, together with the facts requested, constitute overwhelming proof that the contract was abandoned, and that petitioner is entitled to judgment for the unpaid part of the costs which he was compelled to incur.

(1) The court below made the following Findings as to Change Orders A and B made by respondent, viz,

That change order A was issued May 8, 1935 (R. 17) for the following changes in the work:

> "(a) Relocate the High and Intermediate Frequency, and Low Frequency and Helix Buildings, with their respective roads and services * * *; change the details of construction in the Helix House * * *; change interior and exterior details of the Low Frequency Building * * *; provide additional windows and conduit connections at the High and Intermediate Frequency Building * * *; omit three transformers and provide four laundry tubs in lieu of a scrub deck, * * * at the Barracks Building; and
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> "(b) Provide non-ferrous concrete aggregates for the coil and variometer foundations in the Helix and Low Frequency Buildings; provide and install additional ground busses and pipes and three antenna eyes with anchors * * *; and complete the road connection at the main station entrance * * *; All as directed by the officer in charge."

(The order fixed the price for this change order work at $10,905.72, and fixed the time for doing it at 60 days—the time being estimated) (R. 17).

That Change Order B was made July 27, 1935, for the following changes (R. 18):

> "(a) Provide structural steel supports in the roof trusses of the Helix House for the changed location of the antenna eyes;
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> (b) Provide ducts for the parkway lighting cable under future roads as directed;
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> (c) Provide a 50 pair telephone cable in lieu of the 5 pair necessary and omit the installation on same;
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> (d) Provide concrete trenches for transformer connections as shown in lieu of steel conduit as planned at the High Frequency Building, and install a duct for electrical connection to the cooling pond motor; and

(e) Provide additional trenches and make changes in others called for in the Low Frequency Building floor;

All as directed by the officer in charge."

(The order fixed the price for this change order work at $3,204.28, and the time for doing it 5 days—the time being estimated (R. 18; Plf's. Ex. 106-B).

(2) The court below refused to find the following undisputed facts as to the Change Orders—(R. 17, 18).

That the two change orders embraced 65 major changes (R. 28, 29); that as the contract provided that no change in excess of $500 (Plf's. Ex. 101, p. 3) was to be made until there was a written order, petitioner could do virtually nothing when notified of a change to be made until the change order was received, and was thus prevented at times from working a full force, when he had several hundred men on the job (R. 31, 26; Specification Error No. 2—hereinafter designated as S. E.).

(3) The court below refused to find the following additional, undisputed facts as to changes—

From the start of the job, petitioner was required to make many changes from day to day in addition to the 65 changes covered by the two Change Orders (R. 29); that the changes resulted in the buildings not being constructed as provided for in the contract (R. 28; S. E. 2); that by the constant day by day changes the buildings were actually constructed as experimental, new kind of buildings of a particular construction (R. 29; S. E. 3).

(4) The court below refused to find the following facts, based on undisputed evidence, as to the effect of the changes on the progress of the work, the time it took and the added expense—

Petitioner did not know what to do next, as respondent's officials changed their minds on what they decided the day

before, and such inconsistency was demoralizing to the workmen, took extra time in changing from one form of completion to another, and made extra expense (R. 28, 29; S. E. 3); as a result of respondent's delays and mistakes, and of the extra work caused thereby, petitioner was unable to complete the work within the time provided and it was necessary to take the time actually taken (R. 25-31); S. E. 11), in addition to extensions for the time taken in making the change order changes; nothing was allowed for the day to day changes or for the consequential delays resulting from both kinds of changes (Plf's. Ex. 107; R. 29; S. E. 15); petitioner would have completed the work within the time limited, and have made a 10 per cent profit except for respondent's delays (R. 28; S. E. 11).

(5) The disastrous effect upon the progress of the work caused by the multitude of change orders and by the day to day changes as shown above is further illustrated by the following undisputed evidence, viz,—

> "* * * when you are starting * * * it is very discouraging to have to tear out and remove parts of the buildings and change the locations, take the men off of the work and say, 'Here, we can't do this today; we have got an order to change it over to another position'. * * * we can't keep the men satisfied * * *. That just upsets the order of things, that is just a constant changing of orders; and it just shows they are not prepared—they * * * did not build them in the way they were originally laid out." (R. 28, 29).
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> "It was apparently experimental kind of work." (R. 29).
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> "They would find, from time to time, that it did not meet their needs." (R. 29).
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> "From the start of the job, we were given a work order to go ahead, and in a few days we were given a change order to stop and then in a few days more we

would be given another change * * *, and that kept on repeating itself for many months; * * * and the costs necessarily were increased by reason of that unsettled condition * * *. So that meant we had to try to keep our materials and our men coordinated. It was almost impossible to do that, * * * and just broke our morale." (R. 30, 31).

"The written order for the first changes was made May 8th and I received these letters of criticism in February. I couldn't go ahead with the work. One man can write me a letter criticising the slow progress of the work, and another man can write me letters and give me authorization to make changes, and I don't know which one to follow." (R. 31).

(6) Because of the 65 major changes,—one every third day from November 1934 to May 1935, and one every fourth day from May to July 27th, 1935,—and minor changes from day to day for the 400 days the work was being done, resulting in an abandonment of the contract,—petitioner became entitled to recover his added expenditures, plus a reasonable profit, amounting together to $71,704.19 (R. 28):

(a) The Government had no right to compel petitioner, as it did, to make experimental changes, and when found unsuited to its needs to again change, from day to day, and thus improperly interfere with petitioner's work, to his loss. (*U. S.* v. *Barlow,* 184 U. S. 123, 135 to 138 incl., and cases cited at 137).

(b) The authorities on construction of buildings accentuate the principle that to complete them in a reasonable time, or at a reasonable cost, all the details must be planned in advance, but constant changes, as made here, prohibit using advance plans, and entail delays and added expense. (Clark, Architect, Owner & Builder, p. 291; Waste in Industry, p. 72; Eliminating Waste, 8th Nat'l. Housing Conference, pp. 253, 254; Knowles Industrial Housing, p. 34).

(c) The courts, and the authorities on building concur in holding that where there are a multitude of such changes, as made here, the case should be regarded as one of general employment, with an implied obligation by the owner to pay what the work and materials are reasonably worth.

(Same authorities as last cited, and

U. S. v. *Behan,* 110 U. S. 338;
U. S. v. *Spearin,* 248 U. S. 132;
U. S. v. *Barlow,* 184 U. S. 123, 135, 137 incl.;
Sartoris v. *Utah Const. Co.* 21 F. (2d) ps. 1, 3;
Mass. Bonding & Inc. Co. v. *John R. Thompson,* 88 F. (2d) 580, 583, 584;
Montrose Contracting Co. v. *Westchester County,* 94 F. (2d) 580, 583, 584;
Sobel v. *U. S.* 88 Ct. Cls. 149, 165;
Rust Engineering Co. v. *U. S.* 86 Ct. Cls. 461;
Phoenix Bridge Co. v. *U. S.* 85 Ct. Cls. 603; 9 C. J. §55, p. 722;
Emden's Building Contracts, Etc., 4th Ed. Ch. XIV, p. 190; Salt Lake City v. *Smith,* 104 Fed. 457, 458;
Bates & Roger Const. Co. v. *Board of Comrs. of Cuyahoga County, Ohio,* 274 F. 659;
Henderson Bridge Co. v. *McGrath,* 134 U. S. 260).

(d) The refusal of the Court below to find that day to day changes were made, and to find that the effect of the very numerous change orders and from day to day changes was an abandonment of the contract, and to find that petitioner was entitled to recover on a *quantum meruit* his added cost, was in conflict with Rule 41 of this Court,—all of the facts described being ultimate and material facts. (*U. S.* v. *Esnault-Pelterie,* 299 U. S. 201).

(e) Respondent failed to offer any proof that petitioner's expenses were extravagant or unnecessary, and he is en-

titled, under those circumstances, to recover his entire cost, plus a profit, amounting to $71,704.19. (*U. S.* v. *Behan, supra*).

II.

The court below erroneously refused to find that petitioner suffered losses in each of the three items of construction below described (all of which are items of the general losses described under Point I above), although the evidence that petitioner suffered these losses through respondent's delays and unwarranted superintendence is clear, and as to all material matters undisputed, contrary to the provisions of Rule 41 of this Court.

Details as to how ill petitioner has fared are as follows:

(a) Respondent required petitioner to use so heavy a roller on a road completed according to the specifications, except for rolling, that it tore up the road and required refinishing at an extra cost of $5500. for rock and roller rental, taking 30 days extra time (R. 27). The Court below held that respondent was not liable because the weight of the roller was fixed by the specifications (R. 16), whereas this was a guarantee that such a roller would be proper. (*U. S.* v. *Spearin*, 248 U. S. 132).

(b) Certain windows and screens were approved by respondent's inspectors (R. 13). Their approval was final except as against latent defects (Plf's. Ex. 101, p. 4). Respondent required petitioner to have the metal welding of screens and contact rolls together burned off in order to drill notches in the roll, and the rolls and screens rewelded together, and rebuilt (R. 25, 31, 36). The defect, if any, was visible, not latent (R. 36), and notching was not required by the specifications (R. 37). So, the notching was extra work, which cost $1700., and took 30 days time (R. 25, 26). The Court below held respondent not liable because (1) the job

was a hand-fitting one (R. 13), whereas every bit of the work was done and had to be done with a big heavy machine (R. 25, 31); (2) because the job had to be done at the site (R. 13), whereas, (if done at all), it should have been done at the factory before the rolls and screens were welded together, thus saving the burning off and rewelding (R. 25, 31); and (3) because the inspection was purely of materials (R. 24, Opinion), whereas, it included "finished products" (Plf's. Ex. 101, p. 4). Petitioner is entitled to recover the value of the extra work and time (*Henderson Bridge Co.* v. *McGrath,* 134 U. S. 260).

(c) Respondent required petitioner to make 5 experimental efforts to put up a ceiling,—4 by soldering (R. 34; Plf's. Ex. 105-E), 1 by combination of soldering and bolting (R. 16), (the first 4 of which proved failures, and the fifth unsatisfactory) (R. 26), and the sixth by bolting twice the number of bolts without solder as the specifications originally provided (R. 26). The Court below held respondent not liable because proof that the sweating process was impracticable was not satisfactory (R. 16), (on the basis of incompetent evidence that a ceiling had been put up by soldering at Pearl Harbor). This finding is directly contrary to the Court's own detailed previous finding as to soldering, showing that it was impossible and stating its conclusion that both alone and combined with bolts, soldering efforts were unsatisfactory (R. 16), and proof by respondent's expert, that petitioner was unable to obtain tight joints by the sweat process (R. 35); that both methods of sweating, alone and by using bolts with it, failed (R. 38, 39), and that petitioner made serious efforts to sweat the strips on (R. 39). Petitioner was delayed 33 days and put to an extra expense of $1920, by this experimental work, and, therefore, is entitled to recover his loss (*U. S.* v. *Barlow,* 184, U. S. 123, 135, 137).

III.

The court below erred in refusing to make undisputed requested findings the respondent delayed inspecting and releasing for shipment lavatories, putty, and pumps, and in ordering extra cover plates (S. E. 4, 5, and 10).

(a) Lavatories rejected July 19, 1935, were not approved as first submitted until September 30th, making a delay of 65 days (S. E. 4; R. 20; Plf's. Ex. 106-M); (b) putty was ready for inspection September 19, 1935, but was not released for shipment until October 2, 1935, a delay of over 12 days (S. E. 10; R. 14); (c) extra trench plates caused a delay of 2 or 3 days (S. E. 5; R. 26; Plf's. Ex. N); (d) pumps were ready for inspection October 12, 1935, but were not inspected or accepted until after November 2, 1935, a delay of over 12 days (S. E. 9; R. 27, 28; Plf's. Ex. 106-E, 106-H); (e) urinals and other plumbing supplies inspected in July were not released for shipment until October 2, 1935, a delay of over 60 days, which delayed the tile contractor (Plf's. Ex. 104-M; Plf's. Ex. 104-S-U; Plf's. Ex. 104-V).

IV.

The court erroneously refused to find that petitioner is entitled to judgment for the $71,704.19, which he claims (S. E. Point I-16), despite the release.

The release is not binding because:

(a) It was signed when a payment was due, which petitioner could not get except by signing it. He had to have the money for his payroll (R. 30). He had no other means of meeting it. He had $34,187.69 tied up in the work (R. 28). Respondent knew that petitioner's means had been

exhausted, and that he had been obliged to secure advances from his surety. (Plf's. Ex. 103).

Hazelhurst Oil Mill Co. v. *U. S.*, 70 Ct. Cls. 335; *Ingram* v. *Lewis*, 37 F. (2d) 259; cases quoted 70 A. L. R. 711; 84 A. L. R. 296 to 298 incl., and 64 A. L. R. 121, 122; *Hanson* v. *Fowler*, Fed. Cas. No. 6042, Vol. II, p. 469, 471; *Dunbar* v. *U. S.*, 65 Ct. Cls. 567).

(b) The payment was only of what respondent admitted due on the contract and change orders. Nothing was paid or intended by respondent to be paid for the damages outside the contract. The release should be confined to what respondent intended to pay and not be extended to the damages. It is immaterial that petitioner did not except the damages, as he had protested repeatedly previously, with no results.

(*Fire Ins. Co.* v. *Wickham*, 141 U. S. 564; *Piatt's Admr.* v. *U. S.*, 89 U. S. 496; *Atlantic Greyhound Lines* v. *Metz*, 70 F. (2d) 166; *Alexander Kiskadden, Admr.* v. *U. S.*, 44 Ct. Cls. 205; *Nelson* v. *Chicago Mill Etc. Co.*, 76 F. (2d) 17, 24; *Plato* v. *U. S.*, 86 Ct. Cls. 665, 678; *Pneumatic Gun Carriage & Power Co.* v. *U. S.*, 36 Ct. Cls. 71; *Sanborn* v. *U. S.*, 46 Ct. Cls. 254; *Sheridan-Kirk Contract Co.* v. *U. S.*, 53 Ct. Cls. 82; 3 Williston on Contracts (Revsd. Ed.) § 619, ps. 1784, 1785; 4 Page on Contracts, §§ 2451, 2452, ps. 4343, 4344).

(c) The release was given pursuant to a contract provision, which is not susceptible of a construction barring this action (Plf's. Ex. 101, p. 6), which provides that the release shall be of all claims under and by virtue of this contract, other than such claims as may be specifically excepted by the contractor. (Id.)

(1) The object of this provision to insure a contractor the right to assert disputed claims for damages should be given effect. (*Woolworth Co.* v. *Peterson*, 78 F. (2d) 47; *Phoenix Bridge Co.* v. *U. S.*, 85 Ct. Cls. 603, 630).

(2) The effect of petitioner's failure to except is to be determined by consideration of the release in connection with the contract provision as to it (R. 18; Plf's. Ex. 101, p. 6). Holding that this failure defeats the claim would be unjust and unreasonable; that it forfeits the claim; and would be in conflict with the purpose of the contract provision. For these reasons, such holdings should not be made (*Knowlton* v. *Moore*, 168 U. S. 41, 77; *U. S.* v. *Botany W. Mills*, 98 F. (2d) 880, 883; Page on Contracts, Supplement § 2039, ps. 1394, 1395), particularly as the obvious object of the provision as to excepting claims was to give notice of them, and respondent already had notice; petitioner protested repeatedly during the work that the contract price, and the time for completion were both inadequate (R. 30; Plf's. Exs. 105-D-E; 106-C-D-E-F-G-J-L-H; 104-M-R-U-W), no action on which protests had been taken but they were pending (R. 30).

(3) There is no proof that respondent lost any witness, or suffered otherwise through the delay in excepting until the suit was brought. So, no forfeiture was incurred (*American Ship Building & Dock Corp.* v. *John Rourke & Sons*, 4 F. (2d) 845, 846).

(4) The language of the contract is not plain that a forfeiture was intended, and it will not, therefore, be construed as providing for one (17 C. J. S. § 320, ps. 742, 743; *Texas Co.* v. *Pensacola Etc. Corp.*, 279 F. 19, 26, 27; 12 *Am. Jur.* § 307, p. 862; *General Contracting Co.* v. *Grignon*, 255 F. 952, 954).

V.

The court below erred in refusing to find, as requested by petitioner that as a result of delays caused by respondent, petitioner was unable to complete the work within the time fixed by the contract, and was necessarily engaged in completing it the extra time actually taken, as enumerated as to the buildings in No. 11 of the specification of errors, and that respondent illegally deducted $2,490. As liquidated damages, which petitioner duly protested (R. 18, 19, 28; Deft's Ex. AA).

(a) *Respondent caused the delays.*

From the start of the job, petitioner was given a work order to go ahead, and soon after a change order to stop, and, next, another change, which kept on many months, necessitating taking men off the work, demoralizing them and destroying their morale, and resulting in constant delays (Point I above), substituting for the contract specifications, (which it was agreed were to be strictly observed), experimental building from day to day (see Pts. I, II, and III above). Petitioner should not be mulcted with liquidated damages for these delays which respondent caused. (*Clark, Architect, Owner & Builder* 291; *Waste in Industry* 72; *U. S.* v. *Behan,* 110 U. S. 338; *U. S.* v. *Spearin,* 248 U. S. 132; *U. S.* v. *Barlow,* 184 U S. 123, 135, 137.)

(b) *A detailed examination of respondent's charges for delays shows that even in this respect they were improperly made.*

(1) The Court below does not find petitioner chargeable with any delays (R. 11-21), yet, incongruously, finds respondent entitled to liquidated damages (R. 22, 24). This conclusion has no basis in the findings of fact, and can not

be cured by the Opinion. (*U. S.* v. *Esnault-Pelterie*, 299 U. S. 201, 206).

(2) The Court below finds:

(a) That the putty was ready for inspection September 19, 1935, but was not released for shipment until October 2nd (R. 14), a delay of 12 days (Pt. III above); (b) that the contracting officer found that the lavatories were rejected July 19, 1935, and approved as first submitted, but not until September 30th (R. 20; Pt. III above), a delay of 65 days; (c) that the Government delayed from the latter part of October until the completion of the contract work (November 7, 1935) to furnish electricity for testing the pumps (R. 17; Pt. III above).

(3) Respondent concedes that it delayed as follows: 60 days by Change Order A; 5 days by Change Order B; 10 days for failure to inspect roofing material (R. 17, 18), making altogether 75 days.

(4) It appears that respondent caused the following delays, but instead of crediting, it charges petitioner therewith, viz, Ceiling, Helix House 33 days (Pt. II above); Screens 30 days (*Id.*); Road 30 days (*Id.*).

(5) As the court below did not find petitioner chargeable with delays, and as respondent was chargeable with delays, petitioner cannot be assessed with liquidated damages. (*Standard Steel Co.* v. *U. S.*, 67 Ct. Cls. 445; *Greenfield Tap & Die Corp.* v. *U. S.* 68 Ct. Cls. 61; *Christensen Constr. Co.* v. *U. S.*, 72 Ct. Cls. 500; *Bethlehem Steel Co.* v. *U. S.*, 75 Ct. Cls. 845; *Caldwell & Dranke* v. *Schmulbach*, 175 F. 429, 434; *Vilter Mfg. Co.* v. *Tygart's Valley Brewing Co.*, 168 F. 1002; *U. S.* v. *United Engineering Co.*, 234 U. S. 236).

(6) The parties did not, when respondent granted extensions, fix the damages for delays from then on, and it made

no proof that it suffered damages from such delays, and it cannot, therefore, recover damages therefor (*U. S.* v. *United Engineering Co.*, 234 U. S. 236, 242).

VI.

The court below erred, as shown under the points above, in making it conclusions of law "that plaintiff is not entitled to recover and its petition is therefore dismissed, judgment is rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law" (R. 22; S. E. III).

VII.

The Court of Claims erred in making the findings in its opinion set out in the petition in the specifications of errors (S. E. IV) for the reasons shown under the points above. "The special findings may not be aided by statements in the * * * opinion of the court * * *." (U. S. v. Esnault-Pelterie, 299 U. S. 201, 206).

The court below found that "There is no evidence of appeal to the Secretary of the Navy" (R. 21). Although the evidence shows that an appeal was taken to the contracting officer, a representative of the Secretary of the Navy (R. 19), petitioner was not obliged to appeal or submit his claim for damages to said Secretary (*Phoenix Bridge Co.* v. *U. S.*, 85 Ct. Cls. 603, 630; *Clyde* v. *U. S.* 13 Wall. 35, 39).

Conclusion.

Petitioner agreed only to construct these buildings "in strict accordance with the specifications," but respondent, violating this provision, to the benefit of which petitioner was entitled, made many major changes, so sweeping that by them alone the contract was abandoned (Special Finding,

10; R. 17, 18), and day to day changes besides, clearly proven, and not disputed, resulting in experimental building—building one day and tearing down the next, as proved also without dispute (all which the court refused to find), causing the delays in completion, and an added cost of $34,187.69 (Pts. I-II above).

Petitioner proved that the delay and cost increase resulted from these changes, but as the textbooks on construction all state that loss and delay inevitably result from such changes, and the court decisions hold likewise, it is thought that the court would take judicial notice that such consequences would necessarily result from such changes (*Id.*).

We doubt whether any other construction case will come before this Court with so many changes, or entailing such disastrous results, or where a petitioner will be more entitled to the benefit of the recent Act as to procedure in the Court of Claims cases; or where there are so many instances of (1) refusals to find material facts, based on undisputed evidence, and the conclusions resulting from such facts; or (2) lack of substantial evidence to sustain findings of fact made; or (3) ultimate findings not sustained by finding of primary facts; or (4) erroneous conclusions of law.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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